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No. 481

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

FLUOR A. TURRENTINE, HER ENGINES, ETC., AND BROWN & ROOT, INC., Petitioner

v.

AMERICAN HOME ASSURANCE COMPANY, ET AL., Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDMOND L. FORD, JR.
1517 Wilson Tower
Corpus Christi, Texas
Attorney for Respondents

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v.

AMERICAN HOME ASSURANCE COMPANY, ET AL., Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Reasons For Not Granting The Writ

I.

Writ of Certiorari should not be granted as to questions I, II and III because such questions do not set out with accuracy either the facts of the case or the implied holding of the Court of Appeals with reference to incorporation by reference of the Harter Act provisions in the shipper-carrier contract; and in the absence of a decision by this court that the provisions of the Harter Act were incorporated by reference no question has been presented which would affect the outcome of this case.

II.

Writ of Certiorari would not be granted as to questions I and II because they fail to set out accurately the relationship of the tug and barge in that these questions as presented imply that the tug was "hired" by the barge to fulfill an affreightment contract, with the tug in some way sharing the benefits and obligations thereof, whereas by petitioner's pleadings, proof, stipulation and opening statement to the court, the tug's relationship to the barge was to provide towing services only under an entirely different and separate contract and under the pre-trial stipulations of the parties the tug was operated, not by the operators of the barge (as is implied in the questions) but by the owners of the tug (petitioners here) and its agents, servants or employees.

III.

Writ of Certiorari should not be granted as to questions I and II because they fail to set out with accuracy that the trial court found as a fact that the Master of the tug was not sufficiently skilled to undertake the tow and from which finding petitioner did not press an appeal; and by reason thereof the tug was improperly manned and whether the Harter Act was incorporated by reference or not would be immaterial since the Harter Act requires that the vessel be properly manned.

IV.

Writ of Certiorari should not be granted on questions I and II because they are based on a position inconsistent with the position taken in the trial court with respect to the Harter Act in that on trial the petitioner claimed and

strenuously argued that the barge (which he now claims was a part of the unit for affreightment) was not seaworthy and was improperly loaded.

V.

Writ of Certiorari should not be granted as to questions I and II for the reason that there is no conflict in the decision of the Court of Appeals in the instant case and the cited case of *Sacramento Navigation Co. v. Salz*, 273 U.S. 326 71 L.Ed. 663 and 47 S.Ct. 368; and there is no conflict between the Court of Appeals' decision in the instant case and the cases cited by petitioner as reasons for granting the writ.

VI.

Writ of Certiorari should not be granted as to question III for the reason that the question as presented fails to set out accurately the facts in the case in that the question neglects to state that the bill of lading provisions if incorporated by reference allow the carrier the benefit of any cargo insurance only "so far as this shall not void the policies or contracts of insurance." (Pet. for Cert. 43)

VII.

Writ of Certiorari should not be granted as to question III for the reason that the cases cited by petitioner in his application for a writ do not in any way conflict with the holdings of the Court of Appeals in the instant case.

VIII.

Writ of Certiorari should not be granted as to question IV because it does not involve a major question worthy of the time and study of this court.

Corrections to Petitioner's Statement

The statement of the case by petitioner is inaccurate in the following respects:

As to Questions I and II:

1. The bill of lading covering the cargo shipped did not provide for Harter Act defenses.

2. The petitioner did not claim or attempt to show compliance with the Harter Act.

3. The trial court found a failure to man properly petitioner's tug.

As to Question III:

1. The petitioner (now claiming that the tug and barge were a single unit for affreightment) adopted the position that the barge was unseaworthy and introduced evidence and argument to prove it, alleging and presenting evidence that the barge was improperly loaded, that necessary eye pads for cargo security were removed, and that the barge had a rip in the fabric at or close to the water line.

2. Petitioner neglects to point out in his statement that the uniform domestic straight bill of lading if incorporated provides that the carrier has the benefit of insurance only "so far as this shall not void the policies or contracts of insurance."

As to Question IV:

1. Petitioner neglects to point out that it was stipulated between the parties that the amount agreed to be at issue in the case was less than the amount of the monetary value of the cargo lost.

Reasons For Not Granting The Writ

In discussing this case, by reason of the similarity of the names of Respondents, Magnet Cove Barium Corporation (owner of the cargo) and Magcobar, Inc. (its sales agent) will be referred to as owner; Magco Towing Company, Inc. (the private carrier, charterer and operator of the barge) will be referred to as private carrier or barge; and the tug R. A. TURRENTINE and its owners and operators, Brown & Root, Inc., will be referred to as tug:

I.

Question I presented for review specifically states that Section 3 of the Harter Act was incorporated into the bill of lading covering shipment.

In this case, two contracts are involved.

The first is a contract between the owners of the cargo (or its agent) and the private carrier, operator of the barge. The contract is a bill of lading and is in writing. Petitioner, owner of the tug, is not a party to the written contract and is not mentioned therein.

The written contract makes no mention of the Harter Act but it does say, in part:

> "That every service to be performed hereunder shall be subject to all the terms and conditions of the uniform domestic *Straight Bill of Lading* set forth (1) in the Official Southern Western and Illinois Freight Classifications in effect on the date hereof, if this is a rail or rail-water shipment, or (2) in the applicable motor carrier classifications or tariff if this is a motor carrier shipment."

The Official Southern, Western and Illinois uniform domestic straight bill of lading does contain the Harter Act provisions.

The second contract, the oral between tug and private carrier makes no reference to the Harter Act in any way.

The question presented obliquely by petitioner is whether the tug has the benefit of the Harter Act under these circumstances. Inherent in that question is the question of whether, first, the contract between the owner and private carrier in fact did incorporate the Harter Act, and second, whether in some way, if incorporated, the tug became a party to that contract entitled to its benefits and bound by its obligations, and third, whether, if the Act was incorporated, and if the tug became a party, it complied with the terms of the Harter Act by showing on trial that both the tug and the barge were properly manned, seaworthy and properly loaded.

In his petition for certiorari, petitioner does not argue that there was an incorporation by reference of the Harter Act. Parenthetically, petitioner never has. Petitioner has simply *stated* that the Harter Act was incorporated in the owner-private carrier contract. Petitioner does not discuss the wording of the alleged incorporation by reference nor the proposition that the wording affects an incorporation. Petitioner does not discuss whether this is a "rail" shipment, or a "rail-water" shipment, or a "motor carrier" shipment. There is no question in the case but that this was a shipment entirely by water and it would seem that it is manifestly impossible for the condition of incorporation to have been met.

Petitioner does not mention the statement of the Court of Appeals in its opinion (Pet. for Cert. 29), to wit:

> "Since the transportation and towage which gave rise to this litigation was neither a shipment by rail, rail-water nor motor carrier, it is difficult to see how the bill of lading called 'official' could have been incorporated into the memorandum bill of lading when the stated condition of incorporation was not met."

Petitioner concedes by his citation at p. 14 of the Petition for Certiorari of the case of *Koppers Connecticut Coke Co. v. James McWilliams Blue Line*, 2 C.C.A., 1937, 89 F. 2d 865, cert. den. 302 U.S. 706, 58 S. Ct. 25, 82 L. Ed. 545, that, in the absence of an incorporation by reference in the contract between owner and private carrier, even the private carrier would have no standing whatsoever to claim any benefit of the Harter Act. And if incorporated such incorporation would redound to the benefit of the tug only if, in some way, the petitioner were a party to that contract as a result of entering into the separate and independent towing contract with the barge.

Simply stated, questions I, II and III presented to the court would not affect the decision in this case because those questions affect the decision only if the court rules on a question which has not been presented to it and which is a primary and not a subsidiary question, to wit, whether there was an incorporation by reference of the Harter Act. The Court of Appeals having indicated as hereinabove set out that there was no such incorporation and the quoted language of the bill of lading demonstrating that there could be none and no authority or citation on the question being presented, there is nothing of substance presented to this court.

II.

Questions I and II assume that the tug was hired by the private carrier to be operated by it as a part of a contract of affreightment between the owner and the private carrier and that the tug was to be operated by the private carrier with the private carrier's agents and employees. This assumption is incorrect and contrary to the record in the case. The pre-trial order entered in this case (R. 73, 74) provides in part:

> "Brown & Root, Inc., is a corporation and upon the *times and occasions* in question were the owners of the tug, R. A. TURRENTINE and the members of the crew of that tug were the employees of Brown & Root, Inc., and its servants and agents. Brown & Root, Inc., was the *operator* of the tug, R. A. TURRENTINE." (emphasis added)

Other pertinent parts of the pre-trial order are that the ~~carrier~~ T46:

> "was to tow or transport the tow, LTC-6"

and:

> "Among other terms the loading of cargo aboard the barge, LTC-6, was to be done and was done by Magco Towing Co., Inc., and its agents and the tug, R. A. TURRENTINE was to furnish tow service to said tow."

and in petitioner's pleadings (R. 23, 24):

> "Petitioner would respectfully show that under the terms of the agreement with impleaded Respondents

and each of them the tug R. A. TURRENTINE was to perform *towing services only* and it was in no wise to be responsible for the *loading, stowing and caring* for the cargo aboard the barge, LTC-6." (emphasis added)

and again in petitioner's pleadings (R. 17) cargo owner:

"expressly insisted on previous occasions that their responsibility was to load and stow the cargo and it was no responsibility of Respondent or its tug and that the loading was proper; *since there could be no doubt that such was the responsibility of the barge and cargo owner under the charter agreement for towage no further protest was made between employees of Respondent or the crew of the tug;* . . ." (emphasis added).

Further at the beginning of the trial in response to a request by the court for a statement of the respective positions of the parties (R. 92, 93), Proctor for petitioner made the following statement:

"Your Honor, we claim that we had here a contract to perform *towing services only* and it was on a per-trip basis . . . so it is our position that the cargo was *negligently stowed* and therefore—I do not know whether I have used the word 'unseaworthiness' in my defense or not—*the barge was unseaworthy* at the outset of this voyage . . . in addition to that, of course, we have pleaded we were not negligent in the towing operation." (emphasis added)

These quotations and the statement by the trial court (R. 367) to wit:

"Respondents were careful to stipulate and emphasize in pleadings and oral argument that they did not con-

> tract to transport goods, or have anything to do with the cargo but to *tow* a loaded barge."

demonstrate that the petitioner's claim on trial was that there was clearly a towage contract insofar as petitioner was concerned and not a contract of affreightment as now claimed.

Question I further purports to state that Respondent is attempting to hold petitioner to the obligations of a carrier. There is no such attempt. Respondent attempts to hold the tug to its obligations as a tower and specifically in its pleadings, in its statement to the court, in its stipulations in the pre-trial order, recognized that the seaworthiness of the barge and its proper loading were its obligations and that the tug and the barge were not to be treated as a unit for the purposes of the contract of carriage.

III.

Petitioner seeks the protection of the Harter Act. To be available to him it was at least necessary that he produce evidence to demonstrate that the unit for affreightment was seaworthy, properly manned and properly loaded. A fortiori, it is indispensable that the court not have found that the tug was improperly manned. If the tug were improperly manned, and if the court on trial so found, it would be indispensable that the petitioner have urged that point on appeal to the Court of Appeals and further urged to the extent possible in its Petition for Certiorari that such finding was not supported.

The learned trial judge found the R. A. TURRENTINE negligent in the following respects (R. 365):

> "The Master was not sufficiently skilled to undertake the tow."

Here is a finding of improper manning of the tug. No reference is made to it in the Petition for Certiorari to void its effect of destroying the protection, if any, of the Harter Act. It would seem that it is indispensable to petitioner's position that such finding be nullified, otherwise the entire question is moot.

IV.

As is pointed out above, petitioner is now taking a position so contrary to his position on trial with reference to the question of whether petitioner's obligation was to furnish towing services only as distinguished from a contract of affreightment that it is difficult to recognize this case as the same case which was tried.

Petitioner's entire pleadings set forth above are directed toward the position that the barge was unseaworthy and was at fault, that the contract of the tug absolved it from any duty involved in an affreightment contract with respect to the barge which he now claims to be a part of the vessel carrying the goods.

In commenting on this question the trial court (R. 367) states:

> "Indeed one of the principal points, strenuously argued against but not now stressed, was that the cargo was improperly loaded . . ."

In cross-examination (R. 250) petitioner sought to show that there was a tear in the fabric of the barge below the water line with a view to attempting to show that the barge was unseaworthy.

Similarly (R. 211) petitioner sought to show that the eye pads on the deck of the barge for stability of the

cargo were cut off with the argued result that such removal caused the barge to be unseaworthy.

In essence, then, throughout the trial as the trial court has found and as the evidence demonstrates, rather than undertaking the burden of proof of showing the barge, which it now claims to be a part of a unit with the tug for affreightment purposes, to be seaworthy, petitioner sought to show consistently that the barge was unseaworthy; and if it were established that the unit for affreightment purposes was unseaworthy, then, of course, the provisions of the Harter Act would not be met and petitioner would be deprived of their benefits. Therefore, it is apparent that the present claim that there was a contract of affreightment insofar as the tug is concerned as contrasted with a contract to perform towing services only is manifestly inconsistent with the case as tried below and should not be given consideration by this court.

V.

Even if all of the facts were as inaccurately and inadequately stated by petitioner there is no conflict in the cited decisions. In fact, they are consistent with and actually support the position of both courts below.

The prime case cited for petitioner's proposition, *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 47 S. Ct. 368, 71 L. Ed. 663, held that for purposes of the Harter Act a barge and tug are one vessel if the barge and tug are owned and operated by one common carrier either in direct ownership or ownership pro hac vice. The court approved, however, holdings of other courts that where there is a distinct and separate ownership and a contract between tug to perform towing services, the Harter Act

was not available. In the *Sacramento* case the court said in part:

> "Respondent contends that his view to the contrary is sustained by *The Murrell*, D. C. 200 Fed. 826 affirming (C.C.A. 1st) 195 Fed. 483, and The Coastwise, 147 C.C.A. 71, 233 Fed. 1, affirming (D. C.) 230 Fed. 505. Some things are said in those cases which if we should not consider the differences between them and the present case, might justify this contention. The most important of the differences is that in both cases it was held that contracts of towage and not of affreightment were involved. We do not stop to inquire whether this conclusion as to the nature of the contracts was justified by the facts. It is enough that it was so held and this holding was the basis of the decision. Here, upon all the facts as we have just said, the contract upon which Respondent must rest is one of affreightment, the obligation of which is to carry a cargo, not to tow a vessel."

There can, then, be a contract to tow "separated" as petitioner says, from a contract of affreightment by even a common carrier and that contract of towage can create a liability to the cargo owner by the tow by negligent towage of the barge.

Since it was stipulated by pre-trial order that petitioner tug's contract was one to perform towing services only the present case sets well within the reasoning of the court since it was not only held that the contract was one of towage but it was pleaded, stipulated and proved.

In re O'Donnell, 2 C.C.A. 1928, 26 Fed. 2d 334, cited by petitioner, it simply says that an ownership of the tug and barge pro hac vice is accomplished by agreement of the respective operators of tug and barge together to solicit freight, deduct all expenses and share the profits.

The implication of the decision clearly is that while:

> "A partnership stricti juris is not essential . . . it is enough if the owners make a joint contract of carriage with the shipper to the performance of which each binds a necessary vessel."

The Bathgate, 19 Fed. 2d 663, D. C. affirmed on appeal under the style *Insurance Company of North America v. Southern Transportation Co.*, 3 C.C.A., 1928, 25 F. 2d 103, cert. den. 277 U.S. 589, 48 S. Ct. 437, 72 L. Ed. 1002 simply holds that where a barge and tug were owned by the carrier the case is governed by the Sacramento case.

The Fred Smartley, Jr., 4 C.C.A., 1939, 100 F. 2d 971, cited by petitioner, actually supports Respondent. Carrier had a contract to transport goods aboard its barge. The tug was engaged to tow the barge. The Harter Act protection was denied to the barge because it was found unseaworthy but the tug was relieved of liability because it was not negligent. This, then, affects *separation* of the *towing* contract from the *affreightment* contract because if the barge and tug in *The Fred Smartley, Jr.* case were a unit for affreightment contract purposes, the unseaworthiness of the barge renders the *vessel* (tug and barge unit) unseaworthy and *both* should have been denied the protection of the Harter Act. Since they were not, the situation in the case before the court is identical and the result should be that the tug having been found negligent and the barge seaworthy the tug should be held and the barge absolved.

The Lehigh, W.D.N.Y., 1935, 12 F. Supp. 75 and *The Marmor*, S.D.N.Y., 1944, 56 F. Supp. 435, also cited, simply held respectively that common operation of a tug and barge by a transportation company are sufficient to bring the case under the Sacramento case and a 60-40 division of

freight between tug and barge was sufficient to warrant a holding that there was an ownership pro hac vice. *The Vale Royal*, D. Md., 1943, 51 F. Supp. 412, similarly holds that a common direction of a tug and barge by a carrier are sufficient to warrant a holding of ownership pro hac vice.

In the case of *Mississippi Valley Barge Line Co. v. T. L. James & Co.*, 5th Cir., 1957, 244 F. 2d 263, cert. den. 355 U.S. 871, 78 S. Ct. 121, 2 L. Ed. 2d 76, which petitioner concedes supports Respondent's position, it is interesting to note that one of the successful litigants in that case was Brown & Root, Inc., one of the petitioners here. Brown & Root's position successfully taken in that case is the ground on which the court based its decision in the instant case and Brown & Root here is seeking to change the effect of that holding.

In *River Terminals Corp. v. Southwestern Sugar & Molasses Co.*, 360 U.S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, Respondent finds another case cited by petitioner which actually supports Respondent's position. This Honorable Court in that case states that, subject to the Interstate Commerce Commission's approval of such a provision in a tariff, a tug may, as to a carrier with whom it enters into a contract to perform towing services, make a different contract for towing separate and apart from the affreightment contract with restricted liability provisions in the towing contract particularly where it picks up another's loaded barge without responsibility by the tug for loading and with a restricted possibility for inspection of the barge. Here again a separation of the two contracts is recognized and the carrier and the tug are allowed to enter into their own terms apart from the shipper contract.

In addition to the foregoing *Ideal Cement Co. v. The Tickfau*, (E. D. La., 1953) 143 F. Supp. 904, 1956 AMC 2177, supports Respondents's position:

> "Ordinarily, if the undertaking is one of carriage the carrier furnishes the vehicle of carriage, its own bill of lading with such terms as it provides, . . .
>
> "In the light of what took place, I am impressed that the alleged bill of lading was to serve the purpose of showing that the barge and its contents therein described had been received by claimant (tug owner) who, in its original answer, admitted it had been picked up as a tow."

And the court in that case referring to the *Cornell Steamboat Co. v. U. S.*, 321 U.S. 634, 1944 AMC 344 (1944), states that a study of the present steamboat litigation:

> "leaves no doubt that while a carrier engaged in towage may be certificated under the Interstate Commerce Act, when that common carrier enters into a contract of towage, that contract is bound, as to liability, not by the law with reference to common carriage, but by the law with respect to towage."

VI.

In the question presented as question III and in its discussion petitioner never sets out that the bill of lading, if incorporated by reference in the memorandum bill of lading between owner and private carrier, and if, in some way the tug became a party to that contract, that the carrier had the benefit of cargo insurance only

> "sofar as this shall not void the policies or contracts of insurance." (R. 43)

The failure to include this limitation on insurance rights makes the question presented so inaccurate and incomplete as to warrant this court not considering it.

It was stipulated that there was a warranty against a claim by the carrier (Pet. for Cert. 47) and it is recognized by petitioner that such a warranty is effective to destroy the insurance if the claim is valid. This petitioner does not deny. The intention of the bill of lading then is that where there is such a warranty against it, the carrier will not have the benefit of the insurance. The carrier recognizes under such a bill of lading provision that there are two kinds of insurance policy, one of which permits the carrier to have the insurance protection and the other of which provides that if there is an attempt to transfer the benefit of insurance to a carrier the policy is voided by the breach of the warranty. The bill of lading provision then is designed to set forth that if there is no clause voiding the insurance for a claim by the carrier, the carrier will make such a claim, but if a clause avoiding the insurance is present the carrier shall not have the benefit of insurance. This is a business transaction under a tariff uniform in its application and designed to cover a situation identical to the one in the present case. There could be no other purpose of the bill of lading provision but to insure that the insurance would be good and would not be defeated by any claim that the carrier is entitled to its benefits. Both the insurance company and the carrier designed their respective agreements to effect the exact results held by the Court of Appeals and no good reason exists to fail to give effect to the intention of both parties.

The reasoning of the court in the case of *W. J. McCahan Sugar Refining Co.*, 1918, 248 U.S. 139, 39 S. Ct. 53, 63 L. Ed. 170 supports the result in this case and is cited by

petitioner. The facts in that case being virtually identical excepting (1) in that case the carrier under the bill of lading had a.. absolute right to the insurance regardless of its effect on the contracts or policies of insurance, and (2) the loan agreement providing for a loan to be repaid only out of proceeds of collection from the carrier was made subsequent to the loss instead of before. No good reason appears and no good reason is argued to question the legality or effect of either of the two provisions.

The only case found to treat specifically of the identical problem involved in this case is *Hartford Fire Ins. Co. v. Payne*, 199 Iowa 1008, 203 N.W. 4, 39 ALR 1109. In that case an identical provision in the bill of lading was involved and the court held that the insurer may recover against the carrier any loss caused by its fault notwithstanding provision in the shipping contract; and the fact that the insurer voluntarily pays the claim of shipper without setting up the invalidity of the policy is immaterial.

The court in part says:

> "This provision of the shipping contract does not give to the carrier the benefit of all valid insurance, but only the benefit of all insurance that would not be rendered invalid by the destruction of the right of subrogation, and gives the carrier no benefit of insurance when to do so would render the insurance invalid. The clause in question speaks of a contingency, not of a result accomplished. If to apply the provision giving the carrier the benefit of insurance would render the insurance invalid it is not to be applied, and the insurance contract is not invalidated; but if to apply it would not render the insurance invalid, then it is to be applied, and the carrier is entitled to the benefit of the insurance."

VII.

As pointed out hereinabove none of the cases cited on the insurance question conflict with the holdings of the Court of Appeals in the instant case. In none of those cases a similar provision in the bill of lading involved and in none was a loan receipt agreement involved except *W. J. McCahan Sugar Refining Co.* in which the principle of the loan receipt was approved as a desirable business arrangement to effectuate rapidly making money available to the shipper without having to wait to determine whether the carrier was liable or not.

Conclusion

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully submits that a Writ of Certiorari should not be granted on the questions submitted by petitioner.

EDMOND J. FORD, JR.
1517 Wilson Tower
Corpus Christi, Texas
Attorney for Respondents

Certificate of Service

This will certify that copies of this brief have been previously served on Attorney for Petitioner.

EDMOND J. FORD, JR.